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# **In the Supreme Court of the United States**

OCTOBER TERM, 1945

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No. 516

LAURENCE H. ELDREDGE AND THE PENNSYLVANIA  
COMPANY FOR INSURANCES ON LIVES AND GRANT-  
ING ANNUITIES, AS CO-EXECUTORS UNDER THE  
WILL OF CONSTANCE GARDNER TAYLOR, DECEASED,  
PETITIONERS

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL  
REVENUE AT PHILADELPHIA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the District Court (R. 17-19) is reported in 57 F. Supp. 474. The opinion of the Circuit Court of Appeals (R. 22-26) is reported in 150 F. 2d 23.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered June 12, 1945. (R. 27.) The petition for rehearing was denied August 2, 1945. (R. 27-28.) The petition for a writ of certiorari was filed October 17, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

In 1930 the decedent created a trust, reserving the income for life and directing that upon her death the corpus should be paid to her children living at that time or their issue. If no children or issue of any deceased child should be living at her death the corpus was to be distributed as the settlor might by will appoint. In default both of surviving remainderman and of such appointment, the property was to go to the settlor's heirs. The decedent died in 1941, leaving three children and one grandchild surviving. Is the value of the corpus of the trust includible in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after her death within the meaning of Section 811 (c) of the Internal Revenue Code?

**STATUTE AND REGULATION INVOLVED**

The statute and regulation involved will be found in the Appendix, *infra*, pp. 9-12.

## STATEMENT

The facts as found by the District Court (R. 17), supplemented by the stipulation of the parties (R. 7-16), may be summarized as follows:

This is a suit to recover \$44,901.70, alleged to have been collected illegally as an estate tax. (R. 17.)

The decedent, in 1930, prior to her divorce from her second husband, created an irrevocable *inter vivos* trust with respect to certain shares of stock then owned by her. The trust instrument directed the trustees to pay the net income to the settlor during her life. Upon her death, the corpus was to be divided and conveyed in equal shares to her children living at that time, the issue of any deceased child taking such child's share *per stirpes*. If no child and no issue of any deceased child should be living at her death then the corpus was to be distributed as the settlor might by will appoint. In default both of surviving remainderman and of such appointment, the property was to pass to the settlor's heirs. (R. 17.)

At the time of the transfer the settlor was thirty-five years old and the mother of three children who were then thirteen, ten and four. She died testate in 1941, survived by three children and one grandchild. (R. 17.)

The taxpayers, as co-executors under her will, duly filed a federal estate tax return showing a total gross estate of \$50,241.47 and total deductions of \$43,044.64. (R. 9.)

On the date of decedent's death the market value of the principal of the above-mentioned trust was \$319,925.93. The Commissioner determined that the value of the trust property should be included in the gross estate and gave notice to the taxpayers of a deficiency in estate tax. On September 24, 1942, the taxpayers paid the Collector \$44,901.70 on account of the deficiency and on September 30, 1942, they filed a claim for refund of that amount. On May 8, 1943, the claim for refund was rejected. (R. 9-10.)

This action was instituted on April 8, 1943. (R. 10.) The taxpayers made a motion for judgment on the record. (R. 1.) The District Court held that the value of the trust property was properly included in the decedent's gross estate (R. 17) and directed the entry of judgment for the Collector (R. 19). The court below affirmed. (R. 26.)

#### ARGUMENT

Both of the courts below held, correctly, we submit, that the instant transfer was intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of Section 811 (c) of the Internal Revenue Code, Appendix *infra*.<sup>1</sup> The decedent retained not only the income

<sup>1</sup> Since this trust was created in 1930, we are not here relying upon the amendments of 1931 and 1932 relating specifically to the retention of income for life; those amendments have been held to operate prospectively only. *Hassett v. Welch*, 303 U. S. 303.

for life from the trust property but also a contingent reversionary interest in the corpus, thus holding in suspense and delaying until her death or thereafter the ultimate possession or enjoyment of the trust property. In the circumstances this is clearly sufficient to subject the transfer to tax under *Helvering v. Hallock*, 309 U. S. 106; *Fidelity Co. v. Rothensies*, 324 U. S. 108, affirming the decision of the court below reported in 142 F. 2d 838; *Commissioner v. Estate of Field*, 324 U. S. 113; and *Goldstone v. United States*, decided by this Court on June 11, 1945, No. 699, October Term, 1944, not yet reported.

The facts in the instant case are strikingly similar to those in the *Fidelity Co.* case, and both the courts below noted this in their opinions. However, the taxpayers attempt (Br. 10-14) to distinguish that case on the ground that there the property was ultimately to go to persons who were not living at the time of the grantor's death while here the grantor's children, who were designated as remaindermen, were living at the time the trust was created and at the time of her death. It is argued from this that while the possibility of reversion amounted to something in the *Fidelity Co.* case, it was nugatory in the instant one. We submit that this argument is unsound and that the reversionary interest in the instant case, even if remote, is not without significance in determining taxability. It is the plain rationale of this

Court's decisions, cited above, that the tax does not depend upon conjectures as to the relative certainty of the decedent's reversionary interests, and it is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The taxpayers also refer (Br. 12-13) to language of the Court in the *Goldstone* case to the effect that the disappearance of a decedent's reversionary interest prior to death may result in the disappearance of the estate tax liability. But clearly that language has no application at all to the instant situation where the decedent's reversionary interest persisted during her lifetime and was not cancelled or erased. Only when she died, her children surviving, did it become certain that the property would go to them rather than as the settlor might by will appoint. The decedent's death was the decisive factor which enlarged and matured the interests of the beneficiaries.

*May v. Heiner*, 281 U. S. 238, upon which the taxpayers rely (Br. 14-19) merely held that the reservation of an intermediate life estate, without more, did not make the transfer taxable; it did not involve a reversionary interest in the corpus like the one here. The taxpayers also urge (Br. 20-22) that the decision below is inconsistent with *Commissioner v. Irving Trust Co.*, 147 F. 2d 946 (C. C. A. 2d), and in conflict with *Estate of Fahnestock v. Commissioner*, 4 T. C. 1096, and

also with the decision of this Court in *Fidelity Co. v. Rothensies*, *supra*. In the *Irving Trust Co.* case the grantor reserved the right to receive the trust income in excess of a stipulated amount and the trustee had power in its discretion to pay over the corpus to the grantor. However, the court held the transfer nontaxable, distinguishing the *Fidelity Co.* case on the ground that there the grantor had a power of appointment, and taking the view that in the *Irving Trust Co.* case the decedent had disposed of the entire corpus and left no legally enforceable rights in himself either by way of reversion or otherwise. Irrespective of whether the decision may be considered correct, and even if it be inconsistent with the decisions of this Court, we submit that there is no appropriate basis for granting the instant petition, for the *Irving Trust Co.* case turns largely upon its own peculiar facts; there is plainly no direct conflict and in any event, the instant decision is clearly correct. The *Fahnestock* case is materially different from the instant one because there, although the grantor had a remote possibility of reversion he did not retain the income for life<sup>2</sup> and the provisions for distribution of the

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<sup>2</sup> Although the retention of a life interest *alone* cannot be made the basis for taxability prior to the 1931 amendment to the statute (see footnote 1, *supra*, p. 4), it may nevertheless be a relevant consideration, which, taken together with other facts of the case, render the transfer one intended to take effect in possession or enjoyment at or after death.



corpus were made without reference to his death. As above noted, the *Fidelity* case is very similar to the instant one and the taxpayers' assertion of inconsistency is without merit.

**CONCLUSION**

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted,

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NOVEMBER, 1945.